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NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN RE THE DISCIPLINARY PROCEEDINGS AGAINST:

THOMAS G. HETZEL,

Attorney at Law.

PETITION FOR A WRIT OF CERTIORARI FROM THE

WISCONSIN SUPREME COURT

PETITION FOR A WRIT OF

CERTIORARI AND APPENDIX

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15 pp

QUESTIONS PRESENTED

WHETHER A PRACTICING ATTORNEY HAS ANY CONSTITUTIONAL RIGHTS, PURSUANT TO THE UNITED STATES CONSTITUTION AND ARTICLE VI?

. WHETHER THE FACT THAT THE WISCONSIN SUPREME COURT CHANGED THE TRIAL PROCEDURE AND APPLIED THE NEW PROCEDURE SUBSEQUENT TO THE CLOSE OF PETITIONER'S CASE, WITHOUT ALLOWING PETITIONER TO TAKE AFFIRMATIVE ACTION UNDER THE NEW RULES AND TO CORRECT ERRORS IN THE RECORD, CONSTITUTES THE PASSAGE OF AN EX POST FACTO LAW, IN VIOLATION OF THE UNITED STATES CONSTITUTION?

I. WHETHER THE SUPREME COURT OF WISCONSIN, THE COURTS, ITS ENFORCEMENT AGENTS, AND GOVERNMENT ATTORNEYS HAVE IMPAIRED THE OBLIGATION OF A CONTRACT ENTERED INTO BY PETITIONER, IN VIOLATION OF THE UNITED STATES CONSTITUTION, ARTICLE I. §§ 10?

. WHETHER THE LAWS AND APPLICATION OF LAWS BEING DEVELOPED BY THE WISCONSIN SUPREME COURT AND ITS INFERIOR ARM VIOLATE THE INTERSTATE COMMERCE CLAUSE, 15 USC. 1?

WHETHER THE WISCONSIN SUPREME COURT AND ITS INFERIORS HAVE DEPRIVED PETITIONER OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

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I. WHETHER THE WISCONSIN SUPREME COURT AND ITS INFERIORS HAVE APPROVED AND PROVIDED A METHOD WHEREBY PETITIONER IS DEPRIVED OF HIS PROPERTY, AND SAID PROPERTY IS TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. WHETHER THE WISCONSIN SUPREME COURT OR ITS INFERIORS HAVE MADE OR ENFORCED ANY LAW WHICH HAS ABRIDGED THE PRIVILEGES OR IMMUNITIES OF PETITIONER, A CITIZEN OF THE UNITED STATES, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

III. WHETHER THE WISCONSIN SUPREME COURT OR ITS INFERIORS HAVE DEPRIVED PETITIONER OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

IV. WHETHER THE WISCONSIN SUPREME COURT OR ITS INFERIORS HAVE DEPRIVED PETITIONER OF EQUAL PROTECTION UNDER THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

WHAT ARE THE MINIMAL REQUIREMENTS FOR DEFENSE COUNSEL TO YIELD EFFECTIVE REPRESENTATION, PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

I. WHETHER UNDER THE TOTALITY OF THE ENTIRE CIRCUMSTANCES THE WISCONSIN SUPREME COURT AND ITS INFERIORS, THE BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY, HAVE VIOLATED PETITIONER'S RIGHTS UNDER THE THIRTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, WHICH OUTLAWS INVOLUNTARY SERVITUDE?

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IN THE SUPREME COURT OF THE

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Petitioner, THOMAS G. HETZEL, appearing pro se, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Wisconsin, its findings of fact, conclusions of law made on review In Re the Disciplinary Proceedings against THOMAS G. HETZEL, Attorney at Law. The dates of the judgments are April 24, 1984 and May 24, 1984 and the findings of fact, conclusions of law, and recommendation of the referee are asked to be reviewed, also.

PARTIES TO THE ACTION

The parties to this action were:

THOMAS G. HETZEL, Petitioner;

THE BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILTY (BAPR), an arm of the Supreme Court of the State of Wisconsin, SCR. 21, Preamble.

OPINION

In the matter of disciplinary proceed-

ings against Thomas G. Hetzel, Attorney-at-Law, State of Wisconsin Supreme Court, case number 82-382-D, 118 Wis.2d 257, , N.W.2d , , N.W.2d , (1984).

JURISDICTION OF THE UNITED STATES SUPREME COURT

The proceedings are a contested Disciplinary Action commenced by BAPR against Thomas G. Hetzel utilizing four written complaints to state the charges. Trial is had to a referee who makes findings; conclusions of law, and non-binding recommendations to the Wisconsin Supreme Court, which then passes judgment.

The judgment was entered April 24, 1984. The order denying the motion to reconsider is dated May 24, 1984. The Application of Writ was filed the 28 day of June, 1984, with the Clerk of the United States Supreme Court and the Clerk of the Wisconsin Supreme Court.

It is believed that the statutory authorization which confers jurisdiction of the court is 28 USC 2101; 28 USC 1257.

THE FEDERAL LAW INVOLVED

Article I, Section 10:

"No state shall...pass any...ex post facto law, or law impairing the obligation of contracts..."

ARTICLE VI

"This constitution, and the laws of the United States which shall be made in pursuance thereof,... shall be the Supreme law of the land; and the judges in every state shall be bound thereby anything in the constitution or laws of any state to the constraty notwithstanding."

FIFTH AMENDMENT

"No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

THIRTEENTH AMENDMENT

"...nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction."

FOURTEENTH AMENDMENT

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FIFTHTEENTH USC § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal..."

STATEMENT OF THE CASE

On February 8th, 1982, the Board of Professional Responsibility (BAPR) commenced an action by service of complaint. The first complaint contained five (5) counts. By the fourth amended complaint dated April 12th, 1983 but erroneously denomonated the third amended complaint, BAPR had me charged with thirteen (13) different counts and one count was dismissed out by pleading. Trial was had on the thirteen counts. The Referee made his own

findings of facts, conclusions of law and recommendations to the Wisconsin Supreme Court. The Wisconsin Supreme Court reinstated one count dismissed by the referee and determined that a one year suspension of license was appropriate.

In essence, at the fact finding level, Petitioner was successful on eight (8) of the fourteen counts but the Wisconsin Supreme Court reinstated one count. The referee did not assess costs of the disciplinary proceeding against Petitioner. The Wisconsin Supreme Court did in the amount of Eighteen Thousand Five Hundred & Thirty-Two Dollars and Eighty Cents ($18,532.80), which appears to be the entire cost of the referee and BAPR's attorney. The bill was not submitted to Petitioner for perusal nor did the Wisconsin Supreme Court offer to contribute to Petitioner's attorney fees for the sucessful denfense of seven (7) counts.

The counts Practioner was found to be guilty of meriting a one year suspension of his licenses are as follows:

COUNT I - EDWARD & VERA PETERS

BAPR originaly sent a letter demanding a full accounting for all funds received; Practioner was to be required to explain any failure to administer funds in accordance with his agreement with them; indicate the source of funds; the bank accounts the money was deposited into; dates of deposit and withdrawals; and the person to whom the funds were disbureed. BAPR in its letter stated that the client had demanded an accounting of Petitioner. BAPR also wanted an accounting of time. Petitioner was willing to comply but wanted compensation for his time to answer all of these question?

Count one is an extract of the letter from BAPR dated October 24, 1980. The letter itself contained twenty-nine (29) questions.

To answer some of the questions, Petitioner would have to shut down his practice for a week or two. Petitioner is a sole practioner. Petitioner answered the less time consuming questions and informed BAPR that if it or the clients actually wanted the information, said information would be made available, upon reimbursement of time. While BAPR claimed the clients demanded an accounting of Petitioner, Petitioner has denied that the clients ever went to Petitioner and asked for any kind of an accounting.

The issue between the clients and Practioner was whether a portion of the money would be applied on their judgment or Petitioner's fee. Practioner's signed written contract stated funds in trust could be applied on fees. To this day, BAPR or the client, could have any accounting that they want and a copy of any record that they wanted upon reimbursement of time.

The former clients signed a waiver of attorney-client privilege which was filed at a deposition taken of me as to their funds on September 17, 1980. My records were subponead, examined, and found to be accurate to the penny. A representative of BAPR was present and received a copy of this deposition. Neither the clients or their attorney asked any further questions or sought any other accounting. BAPR continued its demand for a complete accounting and continued to be unwilling to pay.

The referee found that the waiver of attorney-client privilege at the deposition was a demand for an accounting by the Peters of me. Implicitly, the referee sustained me on the approximately ten (10) questions submitted by BAPR which were not answered by me. I was found to have violated SCR 20.50(2)(c), SCR 22.07(2)&(3), and SCR 20.04(1).

Subsequent to the referee's rulings, BAPR has made no further demand of any records.

Also, the deposition revealed any other monies collected from the mobile-home owners was collected by a mobile-home owner and turned over in lump sums to Practioner. The mobile-home owner would have these individual records.

COUNT II - ELLEN DIBBLE

Practioner represented Bruce Dibble and Attorney Bruce E. Schroeder represented Ellen Dibble in a contested custody battle. Decision was rendered on October 21, 1980. In the court's decision, it left the parties to resolve in another action Bruce's right to a half-interest in a house that was purchased when they lived together before marriage. Ellen Dibble admitted in the divorce that the agreement between the parties as to the house was that Bruce was to receive a half-interest in it.

As to the Finding of Facts, Conclusion of Law, and Judgment, they were prepared by Practioner had the Guadian ad Litem's signa-

ture and had been submitted to Schroeder. Schroeder did not sign them until November 17, 1980; returned the Findings and they were submitted to the Family Court Commissioner for approval and ultimately were signed by the trial judge on November 28, 1980.

In the mean time, Bruce Dibble wanted an action commenced for his half-interest in the property; he wanted the property awarded to him in the divorce but Ellen had sold the property and pocketed the proceeds. Ellen wanted to avoid a contempt hearing so the parties between themselves worked out an agreement. Petitioner was selected to reduce the oral agreement of Bruce and Ellen Dibble to written form.

Ellen Dibble arrived a half-hour late at Petitioner's office. It was determined that the agreement drafted by Petitioner was not the entire agreement. Petitioner ended up typing two more pages to conform to Ellen

Dibble's understanding of the agreement. Ellen Dibble was told she did not have to sign the agreement and could take it to an attorney of her choice. She declined to do this. The agreement was signed.

Ellen gave to Bruce his one-half interest in the house as had been agreed to when they were single and living together. She relinquished to Bruce One Thousand & Four Hundred and Fifty Dollars ($1,450.00) awarded to her and Bruce gave up his right to his property award that Ellen sold. Ellen would not have received the $1,450.00 since she was receiving AFDC for children not of this marriage.

Neither Ellen Dibble or Practioner consulted with her former attorney, Bruce Schroeder. Subsequently, Ellen Dibble consulted with Bruce Schroeder. The agreement was set aside, with both parties left to pursue their rights in different actions.

The referee made findings that the sti-

pulation awarded Ellen Dibble less than what she would receive in the divorce.

The referee's conclusion was that Petitioner's communication with Ellen Dibble on the subject matter of the divorce, when he knew that Ellen Dibble had been represented by an attorney constituted misconduct in violation of SCR 20.38(1), SCR 20.04(1), and SCR 20.48. Implicitly, the referee ruled this is not new matter not covered under the former action.

COUNT III & IV - JOE L. JOHNSON

Petitioner repesented Joe L. Johnson, who was charged with soliciting Candace Ockect to commit acts of prostitution. Joe was Candace's garbage worker who sold clothes on the side with his wife. Candace was aware of this; went to a motel room with Joe, who was going to be her agent and get her a modeling career. Joe took measurements, had a dozen nude pictures of Candace in various poses one sees in Oui, Hustler, etc., for the purpose of getting

her pictures in as playmate of the month. Joe was in his mid-forties and black; Candace was thirty and white. Another girlfriend of Candace's was down to her bra and panties for measurements; and an undercover police woman would have been if she had not had "important" business elsewhere. Joe had a gift for gab.

After Joe is charged, the parties hit the pre-trial stage shortley before jury trial. After the pre-trial stage, Appellant tells the prosecutor he is going to contact the "victim" witness. There is a discussion between the prosecutor and myself in which my understanding is that if Candace wants to drop the case, the State would be willing to go along with her wishes. In our county, the State usually will press the criminal action regardless of the victims with to dismiss or not.

Instead of seeing Candace personally, Appellant decide to write her a letter. In the letter Candace is told that the District

Attorney knows I am going to contact her, I would appreciate seeing her personally or talking to her over the telephone. She is told she does not have to contact me. At trial, the issue is credibility. It is stated in the letter that the trial itself will be decided by jury; that the nature of the case might be such as not to be in her best interest; the interest of her marriage and could affect her standing in the community; and the trial itself will be emotionally brutal. I also stated, I would like to discuss the case on a friendly basis which can be done prior to trial, I encourage her to talk to the prosecutor; that it is my understanding that the State is not pressing the case, and if she desires it to be dismissed the State would oblige her. She is told I have seen all the evidence (the pictures, the written statements, and the tape recorded interviews of the undercover police officer), and I believe there is

grave doubt that the State will prove its case beyond a reasonable doubt.

BAPR charges Appellant with giving advice to Candace who has an adverse interest to Johnson (SCR 20.28(2)) and falsely advising her that the State is not pressing the case. (SCR 20.04(4)).

The referee makes finding that Appellant attempted to improperly influence the testimony of Candance because of statements made about her best interest of her marriage or standing in her community. (SCR 20.38(2), SCR 20.04(1), and SCR 20.04(4)). The Wisconsin Supreme Court added it's own determination that the referee concluded that I engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, in violation of SCR 20.04(4) by advising the witness that the State was not pressing the case.

Appellant was never charged with the referee's theory or the Wisconsin Supreme

Court's theory. He never defended against either theory nor did the referee or the Wisconsin Supreme Court give advance notice of their theory or charge.

After the trial, there was a change of District Attorney. I supported the loser. Assistant District Attorney Frederick Zievers ordered Myron Keyes, the prosecutor, to file a complaint with BAPR. Zievers supported the new District Attorney. Testimony revealed that Candace was a witness and had no interest in the criminal action.

COUNT V. - ELLSWORTH PETERS

Petitioner represented William Drake against Ella Drake in a divorce action. In the divorce action, William Drake was ordered to reimburse Ellsworth Peters, father of Ella, Two Hundred Dollars ($200.00) payable to Ella's attorney, Dorothy Propsom. The divorce was concluded.

Susbequently, Ellsworth Peters, contacted

Petitioner to handle a breach of contract action. Peters was to pay a Three Hundred Dollars ($300.00) retainer plus costs and disbursements with the remainder of the fee being a contigent fee contract. Work was commenced. The client did not pay the retainer or costs. Client at the same time is also not receiving his Two-Hundred Dollars ($200.00) from the ex-son-in-law, Drake.

According to Petitioner, Ellsworth Peters comes in; asks Petitioner to try, if he can, to get the money from Drake and apply it on his bill. Several letters are sent. Drake makes three (3) payments totaling One Hundred and Twenty-Five Dollars ($125.00) of the Two Hundred Dollars ($200.00) owed. Peters receives his bill which shows that Drake's money is used in reducing the fee. A year passes, Peters now decides to dispute his costs. Petitioner never charges Peters for collection of the One Hundred and Twenty-Five

Dollars ($125.00) nor did any court place any responsibility in any form on Petitioner to collect any money from Drake for Peters.

BAPR claims that Peters had no knowledge and did not consent to Drake paying the money to Petitioner to be applied to his account and that Petitioner refused to pay Peters the money in violation of SCR 20.50(1)(2)(6), and SCR 20.04(1).

The referee determined that I represented both Drake and Peters and it appears the referee understood that the representation was at the same time. He further determined that Drake was ordered to pay the Two Hundred Dollars ($200.00) into Petitioner Trust Account, to be forwarded to Ella's attorney. (This is contra to BAPR's and Petitioner evidence and respective position at all times). The referee further dtermined that when Petitioner received the One Hundred and Twenty-Five Dollars ($125.00), contra to the divorce court

order, he applied the funds on Peters fees to Petitioner which Peters did not agree to and that there was a dispute as to fees not costs. Accordingly, this conduct was contra to SCR 20.50(1)(2)(6) and SCR 20.04(1).

COUNT VI - BETTY LAKE

BAPR charged that Betty Lake made numerous attempts to contact me to assess the status of her case; that I neglected her case in violation of SCR 20.32(3); that I should avoid appearances of impropriety SCR 20.48; that I failed to carry our a contract of employment SCR 20.50(2c) and that I failed to maintain complete records, SCR 20.04(1).

Betty would call, the secretaries would handle her questions. Betty set up appointments when she wanted to see me about any new matter. What happened is that the court dismissed her case. At the same time it was dismissed, motions went out for its transfer to another fereal district. The motions and

the dismissal crossed paths. During this time I was not as timely as I should have been with the brief and motions due to personal family problems. There is some evidence that under the applicable state law of Virginia, Betty may not have a case at all but if Wisconsin law is applied she may.

The referee found that there may be malpractice but no misconduct and that the client talked to the secretary who answered the client's questions.

The Wisconsin Supreme Court reinstitued the count on its own volition. It determined that I did not respond at all to the motion to dismiss contra to the evidence. A brief was submitted (not timely, but submitted). The Supreme Court of Wisconsin stated there was numerous calls to Petitioner which was contra to the evidence and findings of the referee, (ten/(10) calls to the office between 1981 and 1983); that the client was not

informed of the status of the case following dismissal; and the Petitioner failed to disclose information to the Board.

The evidence at trial disclosed that there is a policy in my office that decisions are sent by the secretary to the client. The entire file was turned over to BAPR; it did not appear that the secretary sent the decision. (Petitioner does not object to being responsible for the negligence.) The Wisconsin Supreme Court determined that the Statute of Limitations had not expired while BAPR, Petitioner, and the referee agreed it had.

Petitioner was found guilty of neglect, in violation of SCR 20.32(3). From 1968 to 1983 or in fifteen (15) years of practice, this is the only matter involving an error.

COUNT VII - KAREN FRANKLIN

In 1980, Petitioner represented Karen Franklin, who was charged with robbery of her "trick" who was confined to a wheel-chair of

One Thousand Dollars ($1,000.00) by use of force. Karen had a lengthy felony record; was a heroin addict who was "rolling" her victims. A friend put up One Thousand Dollars ($1000.00) cash for her bail. He assigned the bond to Petitioner for payment on Attorney fees. Karen was charged as a repeater and faced a similar count in a different court, where she was represented by different counsel.

Petitioner entered into a plea bargain with the, then, District Attorney, John Landa, just before he left office. Karen was to get probation concurrent with the other charge and make restitution of One Thousand Dollars ($1,000.00). The entire oral agreement was reduced to writing by Petitioner and mailed to the District Attorney. There was no objection by the prosecution to Petitioner as to the terms of the plea bargain as set forth in writing.

In the meantime, the new District Attor-

ney took office, who I opposed in the election. During the time the new regime took over a plea was entered on behalf of Karen Franklin. At the plea, Frederick Zieviers, assistant district attorney, place an additional term on the original agreement. Petitioner did not hear this. At sentencing, Katherin Lingle, assistant district attorney appeared for the State. She stated that a new term was added- the One Thousand Dollars ($1,000.00) bail was to be applied on the restitution.

At this point, Petitioner informed the trial court that the plea agreement had been sent in letter form to the District Attorney's Office. It was stated that there had never been an objection to the plea bargain as stated; that there had been no discussion of using the bond money; and the the bond was assigned to me for payment of fees.

The trial court ruled that the plea bargain was as I had stated it to be; the trial

court indicated that he had made up his mind before coming to court that he would not abide by the terms of the plea bargain. Karen Franklin was sentenced to three (3) years plus two (2) years as a repeater. Petitioner's relationship with the new trial judge was that he had supported him against Attorney Bruce E. Schroeder of count two when the trial judge ran for District Attorney and had supported the judge when he ran for the office of Judge some years latter. Both the Judge and Petitioner had lost their jobs as Assistant District Attorneys when Bruce E. Schroeder had taken office.

In Wisconsin, the trial judge is not bound by the terms of the plea bargain. No evidence was introduced that under the existing circumstances of Karen Franklin that the sentence of five (5) years was not fair or even a lenient sentence to the defendant.

The Court of Appeals, District II decided

that when Petitioner informed the trial court that the use of the bond to make restitution was not part of the plea agreement that Petitioner's refusal to make restitution out of his monies was sacrifacing the client's interest for his financial gain. The Petitioner is also, accused of causing the hearing to degenerate when he told the truth as to the terms of the plea bargain. According to the District Court of Appeals, Petitioner should make the restitution out of the assigned bond and make new arrangements with a heroin addict for his fees.

BAPR did not call the District Attorney, John Landa, who entered into the agreement with Petitioner. Petitioner did state that had John Landa been able to attend trial he would have testified that when he entered into plea bargains it was not his custom to check the court file to see if there is a cash bond and he does not include the cash bond in his

consideration. BAPR did not object to this testimony. BAPR charged Petitioner with a violation of SCR 20.23(4), 20.35(1a), and SCR 20.48(1) of which the referee found there to be a violation of SCR 20.23(1), SCR 20.24 (1), SCR 20.35(1a), not of SCR 20.24(1), and the referee included a violation of SCR 20.31 (4) on his own.

The referee ruled that the polictial differences between the attorneys or any judge in the District Court of Appeals was not relevant and foreclosed testimony on this issue.

On September 13, 1983, the referee made his findings and recommendations. No costs were assessed.

Petitioner appealed this matter on September 29, 1983. BAPR cross-appealed on September 30, 1983 which cross-appeal was not sustained by the Wisconsin Supreme Court.

At this time in Wisconsin the following Supreme Court Rules (SCR) are in effect:

SCR 22.03 - gives the referee the power of a judge in a civil case;

SCR 22.14 - hearings are a trial of a civil action with the referee to make findings and recommendations;

SCR 22.20 - a referee in a proceeding may assess all or part of the costs if the proceeding goes against the respondent;

SCR 22.23 - the rules of civil procedures apply.

Petitioner's brief on appeal to the Wisconsin Supreme Court was dated November 10, 1983; BAPR's brief was dated December 16, 1983.

On the 24 day of April, 1984, the Wisconsin Supreme Court filed its Per Curiam opinion. The Wisconsin Supreme Court recognized that Petitioner objected to some of the findings of the referee. It made no reference to the fact that Petitioner requested the Wisconsin Supreme Court to make additional findings based upon the record. It simply declined to do so without mention of Petitioner's request.

On January 27, 1984 the Wisconsin Supreme

Court made the following procedual ruling:

> "In an attorney disciplinary proceeding, we review the referee's findings of fact and adopt them unless they are clearly erroneous... Any language in our prior opinions to the effect that we conduct a de novo review of the record and independently make factual findings is no longer applicable to attorney disciplinary proceedings." Disciplinary proceeding against Willis B. Swartwout III (1-27-84) 116 Wis.2d 380, 382-383, 342 N.W. 2d 406.

The State Supreme Court used this new procedure in Petitioner action.

As to Count I, Edward and Vera Peters, the Wisconsin Supreme Court adopted the referee's finding that the oral accounting made at the deposition accompanied by a ledger sheet attached as an exhibit was inadeguate. (The referee made no finding of indequacy?)

As to Count II, Ellen Dibble, the Wisconsin Supreme Court notes that this discussion with Ellen Dibble occurred "before entry of the Court's judgment." Entry of judgment

calls for a filing of the signed written judgment in Wisconsin. The Wisconsin Supreme Court ignored the fact that Bruce Dibble can have an independent claim for pre-marital property or that the divorce court did not deal with pre-marital property. It also stated that the agreement gave her less then the Court awarded her in the divorce action.

As to Court III and IV, Joe L. Johnson, the Wisconsin Supreme Court made the determination that Petitioner knew the State intended to go to trial because he attended the pre-trial conference. (Had evidence been introduced, one would find that Petitioner and at least one other trial attorney in Kenosha County do not receive offers from the State until pre-trial and the cases, if negotiated, are negotiated up to trial time. The Wisconsin Supreme Court belief as to what occurs and the practice of law are not synononous). The Wisconsin Supreme Court adopted the referee's

conclusion (even though Petitioner was not charged) that he attempted to influence the testimony of the witness and added its own charge that Petitioner had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by using the words:

"the State is not pressing the case."

As to Count V, Ellsworth Peters, the Wisconsin Supreme Court corrected the referee's erroneous findings that Drake was to pay the divorce fees to Petitioner's Trust Account pursuant to the divorce judgment; never considered the fact that if the referee was in the wrong ball park to begin with that the rest of his statements were suspect; stated that the dispute between the client was with fees which it was not. Said dispute was over costs. The Wisconsin Supreme Court adopted the referee's conclusion rejecting any claim that Peters had verbally authorized me to apply Drakes money on the fees.

Implicit in the Wisconsin Supreme Court's findings is that the letters sent to Drake are written for free, at my expense. At the same time little weight is given to the fact that for a year, Peters received statements showing the fee owned is reduced and that it is money Petitioner received from Drake that reduced the bill.

As to Count VI, Betty Lake, the Supreme Court determines that failure to inform the client of the status of her case is misconduct. Likewise, calls by a client to the secretary are calls to the attorney. The statement as to the Statute of Limitations by the State Supreme Court, is completely erroneous. No standard is announced or evidence produced as to how many times a trial attorney should have direct contact with a client and continue to try cases.

As to Count VII, Karen Franklin, the Wisconsin Supreme Court adopts the Court of Ap-

peal's position with this statement of facts. The Court states, I refused to agree to make restitution out of the bond money assigned to me for fees. However, there is no evidence I was asked even at the sentencing date if I agreed to this new term by the prosecutor. Petitioner is also held responsible for the Assistant District Attorney's lack of enthusiastice support for the plea bargain. He is held accountable for the State's breach of the agreement and it's lack of a whole-hearted endorsement. Contemporaneously, the Court does not find significant that the client had no interest in the bond money. The Supreme Court, in its findings, does not discuss the fact that in felonies in Wisconsin neither fines, costs, or restitution are taken out of bail money. Also, restitution is made a condition of probation with the probation department handling the supervision of payment of restitution. There is not discussion as to

whether the State or Petitioner would need permission of the person who put up the bond money to make application of such funds for the Defendant's restitution.

The Wisconsin Supreme Court decided on its own to assess Petitioner the costs of the disciplinary proceedings in the amount of Eighteen Thousand, Five Hundred & Thirty-Two Dollars and Eighty Cents ($18,532.80). No bill was submitted to Petitioner nor was a hearing had as to costs.

On May 11, 1984, a motion to stay the suspension of the license and a motion for reconsideration was forwarded to the Wisconsin Supreme Court wnich was denied on May 24, 1984 Petitioner was granted the right to petition for additional time to pay the costs if he files a motion that he needs more time.

Constitutional questions were raised as follows: the right to be compensated for time

spent before the referee. In petitioner's motion for reconsideration it was stated that there was a denial of due process of law; application of an ex post fact law; deprivation of notice to the petitioner; denial of due process in assessment of costs that the State Supreme Court was not following its own procedures; (the new one); that petitioner was being found guilty of uncharged counts; that to take one's fees to make restitution for a client constituted a taking of property;

Petitioner requested that the matter be returned to the referee so that findings of facts could be made on those points petitioner deemed material. The remaining constitutional questions raised are corrollary to the others raised.

With the referee to be fact finder and the Supreme Court to make "de novo findings" there is no precise point to neatly raise

the constitutional issues. With the change in procedure pronounced at judgment, the facts were not found till I was condemmed.

It seems apparent that BAPR believes itself to have absolute power. BAPR and the fundamental constitutional rights of the practitioner must collide. Does Cohen v. Hurley 366 U.S. 177, 81 S.Ct. 954, 6 L.Ed. 2d 156 (1961) make the practitioner a second class citizen subservient to the whim of a dissatisfied client, a jealous attorney; BAPR, or the Wisconsin Supreme Court. To retain one's right jeopordizes one's license, livilihood, and family's future. All losses to be suffered without

any recognizable standard and contra to rights I thought I had guaranteed by the United States Constitution and applicable federal case law.

For instance the dispute with Edward and Vera Peters is whether the clients can use the money to pay their judgment and I am left without fees. This situation is common after judgment is entered. BAPR's claim that they can ask unlimited questions, which are unrelated to the issue between the client and the attorney. The attorney suffers a loss of time. To the sole practioner this loss of time is severe and its financial impact is felt immediately. All I asked was to be compensated for my time. To assert a right to be paid for time expended then causes BAPR to charge that failure to answer the complaint is misconduct. Do I have a right to a hearing on whether BAPR can ask me any question? Do I have a right to be paid for any time spent for an unreasonable or arbitrary question?

With the Dibble case, after the "battle" is over and a decision is rendered, it would be nice to have some peace. The Supreme Court has now announced a rule which ties a client to his attorney until there is entry of a judgment. Yet, there are thousands of cases in my county alone which are lying fallow - no written order of dismissal or the attorneys are not pushing them to completion for one reason or another. Yet there are a few trial attorneys in the county. The clients may decide to save one attorney's fee or decide to use a former opposing counsel on a new matter. Yet the consumer under the State Court's ruling would be tied to another attorney because of no dismissal? Many times a new divorce action is started with a previous divorce action remaining undimissed. With Ellen Dibble's case, as a practioner, I considered it new matter, so did the clients. The reduction of the decision to a writing is form. Ellen

Dibble was told she could see an attorney of her own choosing. This should be sufficient safeguard to all concerned.

In regard to Joe L. Johnson, a criminal defendant is entitled to the effective assistance of counsel. I also know what happens if I am ineffective as a criminal defense counsel. Would you consider a statement as to what comes within the guidelines of being effective in a criminal case when the sole practitioner is without a private investigater. I felt bound to try to make some attempt to contact the witness. This was going to a trial in which the "victim's" nude photography session was relevant. At trial I represented my client. But before trial, I see no harm in trying to be a gentleman. The prosecutor indicated to me that if the witness wanted to have the case dropped, it would. The prosecutor has no duty to inform her of this. Under my standards of conduct, I think I have a duty to my client to

inform the witness that the State is not pressing the case and is willing to dismiss if she desires the action to be dismissed.

As to the Ellsworth Peters case, the very cornerstone in the practice of law is the attorney-client privilege. It is built on trust. In this case, a practising attorney, at the request of a client's to have the client's debtor pay the attorney. The attorney is not going to make his client "put this in writing," not for Two Hundred Dollars ($200.00). The practitioner is caught in a quandrary. To say no injures the trust relationship and to make the client put his "word" in writing also damages the trust relationship. It should be noted that there is no articulated standard by the Wisconsin Supreme Court at this time so that any decision by a practioner as to how to hanle a situation results in the issuance of the standard after the fact. The attorney's license is placed in jeoporady at the whim of

the client? There is no time limit imposed to limit discipline or to state the matter affirmatively in the Ellsworth Peters case. The client receives notice that his bill is being reduced by the use of Drake's money for over a year. The client takes no action until he decides to move the case because of a dispute over costs incurred.

As to Betty Lake, the standard set by the Wisconsin Supreme Court is unworkable in the practice of law. As to the error, I have insurance. As to what the Supreme Court believes should be done in the handling of the case it is economically not feasible, will drive the cost of the practice up, does not recognize that trial attorneys are not readily available to clients, fails to understand the role secretaries must play if the clients are to have effective assistance of counsel at their trial criminal case or non-criminal case.

As to Karen Franklin, attorneys are now

to make restitution for their client out of their fees? At the same time when the prosecutor makes a misstatement on a plea bargain, the defese counsel can not tell the truth to the court for fear of his license being suspended?

With rulings such as this, the trial practise of law by a sole practitioner is jeopordized. The Practitioner's in criminal cases effectiveness is chilled. I do not have the right to pursue my livilihood. My contracts for fees are subject to the whim of the prosecutor who can decide to punish me by taking away my fee by simply inserting a new term in the plea bargain.

Thus, I am allowed no error yet must be effective. BAPR can take away my time, without just compensation. This is the same as giving one the right to tax me out of existance. I have no right to dispute BAPR's request for information. If I do dispute, I am

charged with wrongdoing. If I submit, I lose time. If I contest the charge, I pay for the cost of BAPR's attorney and the referee's cost even if sucessful. The Wisconsin Supreme Court can change the rules and the charges without notice. I can be found guilty of charges not filed. And yet if I am not a lawyer, this can not be done to me. There seems to be no reason why the trial attorney can not be accorded fundamental constitutional rights.

ARQUEMENT

The first question deals with whether a practicing attorney has any Federal Constitutional rights whatsoever. If the answer is no one need not go beyond this sentnece. Cohen v. Hurley (1) appears to hold that a practicing lawyer in a disbarrment proceedings does not have fundamental constitutional rights. Bates v. State Bar of Ariz. (2) seemed to let in a "shred of light" and allowed the attorney some first amendment rights. In my case

before the Court, it is Petitioner's position that the State Supreme Court, BAPR, and the referee have taken the position that a practictioner has no fundamental constitutional rights. Therefore, they are not subject to the Constitution or subsequent United States Supreme Court interpretations of said Constitution, contra to Article VI, Cl. 2 of the Federal Constitution. Martin v. Hunter's Lessee (3). According to my count, the above parties have violated two Articles, four Amendments and twenty-nine case interpretations all of which have been in existen for forty years.

The second question deals with the fact that after the trial is concluded and appeal briefs are in, the State Supreme Court changes the procedure from one of de novo review of the record to a standrad that it will accept the referee's findings unless clearly erroneous. This substantive procedural modification altered the procedure to my disadvantage since

I was unable to correct the record. This is an ex post facto law. Duncan v. Mo. (4). Petitioner trying the case with the understanding that the Supreme Court would be conducting a de novo review and issue an independent finding.

As to question three, Petitioner has a contract with the prosecutor in the Karen Franklin count as to the terms of a plea bargain. As to his fee payment, there is another contract in which a third party has assigned his bond which he put up for the Defendant to pay her fees. The Supreme Court can not impair my obligation of contract. Van Hoffman v. Quincy (5). Neither the prosecutor or any court should be able to take the cash bond and leave me without any substantital remedy to enforce my fee contract. The remedy I am left with totally embarrasses the enforcement of any fee contract making it worthless. Oshkosh Water Works Co. v. City of Oshkosh (6).

As to question four, it appears that the superintending power which the Courts have of its "officers" is leading to regulations and laws which are beyond the scope given to the Courts by the State for the purpose of regulating the practice. Hoover v. Ronwin (7). In Wisconsin, membership in the bar is involuntary, but necessary to practice law. The State Supreme Court and BAPR are making practice rules, which may be contra to membership wishes and beyond the scope of legislative authorization.

For instance, the State Supreme Court adopted BAPR's desire that an attorney can tie a client to him until a written judgment is signed. This is an "after the fact interpretation" in regards to this action. The consumer is tied to his former attorney by said former attorneys' lack of action in approving a judgment or a family court commissioner or a judge's failure to sign the judgment.

Thus, the client cannot voluntarily see opposing counsel to settle matters not covered in the divorce for which she desired to avoid payment of an attorney's fee.

The fifth question deals with one's right to life, liberty, and property until deprived of it by due process of law. An attorney's calling is his property and can be removed only upon a clear case of misconduct. Ex Parte Wall (8). In this case, the referee developes one charge on his own and the Wisconsin Supreme Court developes one charge on its own in the Joe L. Johnson case. Material variances from the charges violateds due process. NCRB v. Makay Radio & Telegraph Co. (9).

As to question six, Petitioner was assigned a One Thousand Dollars ($1,000.00) bond belonging to one other than the Defendant for his fees. This is property. Can the prosecutor at sentencing or a judge make the attorney pay restitution for the client without

awarding Petitioner just compensation? U.S. v. Lee (10).

As to the Sixth Amendment, counsel understands that while my Sixth Amendment rights have not been violated per se, the conduct of BAPR, the referee, and the State Supreme Court will have a chilling effect on any defense counsel's effective representation. That BAPR does not give credence to defense counsel's Sixth Amendment obligation can be seen in its original charges in regard to Joe Johnson. BAPR believed a victim is a party to a criminal action and is represented by the State's Attorney. If a defense counsel is to make last minute restitution for his client or if the prosecutor can add terms to a plea bargain at sentencing for which a defense counsel is punished for telling the truth, this allows the State to emasculate the attorney-client relationship. Does one have to accept in silence whatever is said for fear of loss

of his license to practice?

As to whether Petitioner's privileges and immunities have been abridged in violation of the Fourteenth Amendment, other people have the right to participate in interstate commerce. Cruthcher v. Ky (11); have the right to own property (Cash bonds for fees are property); Oyama v. Cal. (12); have the right to be free from injury of person and property and to be free of the arbitrary power of the personel monarch or impersonal multitude. Hutado v. Cal. (13) The pnenumbra of police power does not give authority the power to invade rights secured by the Constitution. Mugler v. Ks.(14) Local legislation for others cannot run afoul of specifice federal constitutional prohibitions nor can it be arbitrary and oppressive. N.S. Pharm. Bd. v. Snyder's Stores (15).

As to whether Petitioner has been deprived of life, liberty, or property without due process of law, the conflict of interest rule in

the Karen Franklin charge constitutes a taking of property. Penn. Coal Co. v. Mahon (16). Liberty includes the right of the individual to contract and to engage in any of the common occupations of life. Meyer v. Neb. (17). While property can be regulated, it still belongs to the private owner and is entitled to protection. Wolff Co. v. Inc. Ct. (18). To deprive one of the use of the property is to deprive one of the property itself. If some people can make a reasonable profit on their investment and one category cannot, then, there is denial to the discriminated occupation of the equal protection of the law. Chi., Milw., & St. Paul Ry Co. v. Mn. (19).

In Count I, BAPR made overly broad demands for information, coupled with the fact that the rules are set up so that to contest BAPR's right to information causes a loss of occupation. This becomes arbitrary and oppressive and constitutes a taking of property.

Mo., Pa, RY Co. v. Tucker (20).

If a government agent takes property for the benefit of one person it constitutes a taking. Rindge Co. v. LA (21). In the Karen Franklin case there is no provision in State law for restitution to be made out of a bond. The assistant district attorney's private condemmation of the bond for the use of the victim is a taking. Clark v. Nash (22). There is neither a procedure set up for Petitioner to make a claim for compensation nor was there any prior notice given to Petitioner that there was to be a taking. Walker v. City of Hutchinson (23).

As to whether the State Supreme Court's judgment against Petitioner on charges in which he has not had an opportunity to introduce evidense; or, as to his right to be heard on the assessed costs; or, to correct the record where the referee has entered findings contra to the evidence or the charges made by

BAPR, the Fourteenth Amendment indicates Petitioner should be allowed a hearing. Saunders v. Shaw (24). It would seem fair that if the referee has failed to make finding in a given area which Petitioner believes important that Petitioner should be accorded the opportunity to have these facts determined even if the State Supreme Court latter wants to ignore those fact. The State Court's decision and statement of facts is published for the Bar to read. It is misleading as to the true issues.

At all times material to this action the following occurs. The proof of a fact leads to the desire inference to be drawn without the necessity of there being a rational connection. The Practitioner's view of practice is not considered. The inferences drawn amont to a purely arbitrary mandate. Mobile, Jackson, & Kansas City RR Co. v. Turnipseed (25). For instance, in the Dibble matter the decision was handed down and the findings are

reduced to writing. The G.A.L. approved the findings; Schroeder holds on to them. After the fact, BAPR argues for a ruling that the client is tied to the attorney until the judgment is signed by the judge. This is convenient for BAPR in it's administration of the rules but is not rational from the Practitioner's point of view. Once the decision in a divorce case is "handed down" if a party violates the decision or wants to handle a matter not dealt with by the trial court in the decision, this is "new matter" for which a new fee should be charged. A practitioner would evaluate the cut-off point as follows:

> If it is old matter and the fee is paid or new matter for which a fee is to be charged.

This is how the client thinks as well.

It is undisputed that Ellen Dibble was told she could seek the advice of counsel of her own choosing. She choose not to but stayed to sign her agreement on the terms she

bargained for. The practitioner believes the matter to be new matter in which case Ellen Dibble must rehire her former attorney. In any event, a decision was made as to whether Schroeder represented Ellen. There was no guidance or case decision. To lose one's livilihood, after the fact, seems arbitrary. To live in fear of BAPR when one makes a judgment call is oppressive.

Consider that in Ellsworth Peters, Peters is given statements as to the fact that money is received from Drake and is being used to reduce his bill. A year later, he states that there was no oral agreement to use the Drake money to reduce his bill. The inference appears to be that a client has only to state there is a dispute at anytime during the course of employment and it is resolved against the practitioner. To the practictioner this is arbitrary and political.

In Betty Lake there is an error for which

there is insurance. The decision is that one case leads to a finding of neglect for which there is disciplinary action. What attorney can go fifteen years without error? This is an arbitrary standard. Attorney's are not perfect and for one reason or another, there will be errors. This is why we carry insurance.

In Joe L. Johnson, the referee's theory is that I am attempting to influence her testimony. This does not rationally follow when I told her to see the prosecuting attorney. The Supreme Court's theory is that the use of the term in the State is not pressing the case coupled with the fact that I tell her to check with the District Attorney is fraud, dishonesty, misrepresentation or deceit? The logic of this dumbfounds me.

In Karen Franklin, BAPR never proves the original plea bargain was ever contrary to what I stated it was with the District Attorney, John Landa. Yet to tell the truth leads

to a loss of license. It lacks a rational basis from the practitioner's viewpoint.

If I understand history, except for acts in Court it was not the Court but practicing attorneys that disciplined an attorney. In Wisconsin, "in the good old days" BAPR dealt with lawyers who stole money, neglected a number of cases for years, were alcoholics, failed to pay their income taxes, were medically incapacited, etc. It appears that BAPR wants to embark in a new area and I am the lucky victim.

When the referee and the State Supreme Court decided to prosecute two charges on their own, they took an inconsistent position in the Joe Johnson case. They became partisan and deprived Petitioner of due process of law. Tumey v. Ohio (26).

When the State Supreme Court decided to change procedure from a de novo hearing; when the referee and the State Supreme Court decided

to prosecute their theories; when the Supreme Court decided to asses Eighteen Thousand, Five Hundred & Thirty-Two Dollars and Eighty Cents ($18,532.80) as costs for Petitioner to pay - coupled with the fact that BAPR was fifty percent unseccessful; when the Supreme Court refused to let Petitioner return to the referee to correct his erroneoneous findings; and be allowed to ask the referee to make findings of fact that Petitioner deemed important; the condemmed was deprived of due process of law for in all the above instances, he was neither afforded sufficient notice nor an adequate opportunity to defend. Jordan v. Mass (27). To convict upon a charge that was never charged or to fail to give notice of the specific charge was a lack of proceducural due process. Cole v. Ark (28).

In the present charges, the two counts of Joe Johnson should be reversed because they are uncharged; in the Dibble case, at the briefing

stage, BAPR brings in the now concept that the client and attorney are tied until a written judgment is signed by the Judge. Petitioner is precluded from introducing evidence that practice differs from theory. In the Ellsworth Peters charge the referee findings disclose that he started out on the premise that the Two Hundred Dollars ($200.00) was to be paid into Petitioner's Trust Account by order of the divorce judgment. From the incorrect foundation he proceeded to his conclusion. The Supreme Court who changed the procedure - corrected the referee's error in its "de novo findings" which it said is no longer the law and then adopted the referee's conclusion. In the Betty Lake case, the finding that the Petitioner conduct may be malpractice was thrown out and the State Supreme Court inserted its findings of facts:

> That it is neglect for which discipline is to be imposed. And the Statute of Limitation had not passed

which was contra to what all agreed at the "trial" level.

When one examines the charges, the evidence BAPR put in, the findings, the conclusions, and the punishment of one year suspension plus the assessment of Eighteen Thousand, Five hundred & Thiry-Two Dollars and Eighty Cents ($18,532.80) in costs with BAPR having been unsucessful in over half of the counts at the referee level, I am hard put to believe that the law though appearing fair on its face and impartial in appearance is not being applied and administered with an evil eye and an unequal had so as to amount to a denial to Petitioner of the equal protection of the law. Yick Wo. v. Hopkins (29).

To continue the denial of equal protection of the law arguement further, there is no provision for payment of my retained counsel's fees if I prevail on any count. Yet Petitioner is to pay BAPR's attorney fees and the entire

cost of the referee if wrong and Petitioner does not recover at least his attorneys fees and not have to pay the referee if right. My adversary recovers if right and pays nothing if wrong. BAPR and I do not stand equal before the law and do not receive equal protection of the law. Gulf, Colo, & Santa Fe Ry Co. v. Ellis (30).

CONCLUSION

BAPR, its attorney, the Referee, and the Wisconsin Supreme Court have each acted out their function. These people are "presumed" to know the law. Their acts leave little doubt in Petitioner's mind that it is their belief that the practicing attorney has no constitutional rights whatsoever since they have wantonly violated every constitutional right that I have. The question before the United States Supreme Court is;

> "Do I have any constitutional rights while I practice law?"

Is it, that upon being licensed to practice law I have agreed to involuntary servitude which was outlawed by the Thirteenth Amendment of the United States Constitution. (31).

As to a suitable standard, the standard should be suitable for a sole practitioner who is a trial attorney. This means one who is involved in cases from Cook County, Illinois to the Northern tip of Wisconsin. Time in Court, to include travel time, means he is away from his office during the hours of 8:30 A.M. to 5:30 P.M., sixty to seventy percent of the time. New clients, witness, and trial preparation and research are accomplished during lag periods during the day, evenings and Saturdays. The trial caseload involves traffic, criminal, divorce, personal injury, contract, corporate, trademark, tradename, tax, probate, realestate, social security, worker's compensation, bankruptcy, etc. Unusual cases are not

rejected nor clients turned away who lack funds.

This type of practitioner, unlike many of his brethen, is not going to be sailing on calm waters. Yet for the law to respond to the needs of the people, this type of practitioner should not have to be in fear of loss of his license because he makes a decision. Nor should he be denied basic fundamental constitutional rights because he is involved with an ethics commitee.

FOOTNOTES

(1) 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961)

(2) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)

(3) I Wheaton 304, 4 L.Ed. 97 (1816)

(4) 152 U.S. 377, 382, 14 S.Ct. 570, 38 L.Ed. 485, 487 (1893); see also, Thompson v. St. 170 U.S. 343, 185 S.Ct. 620, 42 L.Ed. 1061 (1898)

(5) 4 Wall 535, 552 (1867)

(6) 187 U.S. 437, 439, 23 S.Ct. 234, 47 L.Ed. 249, 250 (1903); see also, New Orleans v. L.R. Co. v. LA., 157 U.S. 219, 224, 155 S.Ct. 581, 30 L.Ed. 679, 681, (1895); Home Blgd. & Loan Asso. v. Blaisdell 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413, 422 (1934); Barnitz v. Beverly 163 U.S.118 125, 16 S.Ct. 1042, 41 L.Ed. 93; W.B. Worthen Co. v. Kavanaugh 295 U.S. 56, 60-79, 55 SCt. , 79 L.Ed. 1298 1301-02 (1935)

(7) U.S. , L.Ed.2d , 104 S.Ct. 1989 (1984)

(8) 107 U.A. 265, 288-289, 2 S.Ct. 569, 27 L.Ed. 552, 561-562 (1882)

(9) 304 U.S. 333, 350, 58 S.Ct. 904, 82 L.Ed. 1381m 1392 (1938)

(10) 106 U.S. 192, 220, 1 S.Ct. 240, 27 L.Ed. 171, 181-182 (1882)

(11) 141 U.A. 47, 57, 115 S.Ct. 851, 35 L.Ed. 649, 652

(12) 332 U.S. 633, 640, 645, 647, 69 S.Ct. 269, 92 L.Ed. 249 (1948)

(13) 110 U.S. 516, 536, 4 S.Ct. 111, 28 L.Ed. 232, 238, 239 (1884)

(14) 123 U.S. 623, 660-661, 8 S.Ct. 273, 31 L. Ed. 205, 210 (1887)

(15) 414 U.S. 156, 165 (1973); see also, Treigle v. Acme Homestead Ass'n 297 U.S. 189, 197, 56 S.Ct. 427, 41 L.Ed. 832 (1897)

(16) 260 U.S. 393, 415-416, 435 S.Ct. 158, 67 L.Ed. 322, 326 (1922)

(17) 262 U.S. 390, 399-400, 43 S.Ct. 625, 67 L.Ed. 1042, 1045, (1923); see also Allgeyer v. LA. 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832 (1897); Coppage v. Kansas 236 U.S. 1, 14, 35 S.Ct. 240, 59 L. Ed. 441 (1915)

(18) 262 U.S. 522, 535, 544, 43 S.Ct. 630, 67 L.Ed. 1103, (1923)

(19) 134 U.S. 418, 458, 10 S.Cy. 462, 10 S.Ct. 702, 33 L.Ed. 970 (1890)

(20) 230 U.S. 340, 349, 351, 33 S.Ct. 961, 57 L.Ed. 1507 (1913)

(21) 262 U.S. 700, 707, 709, 43 S.Ct. 689, 67 L.Ed. 1186 (1923)

(22) 198 U.S. 361, 25 S.Ct. 679, 49 L.Ed. 1085 (1905); see also-Strickly v. Highland Boy Mining Co. 200 W.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906); Dohany v. Rodgers 281 U.S. 362, 364, 366-367, 50 S.Ct. 299,

74 L.Ed. 907 (1930); Mo. Rac. Ry. Co. v. Neb. 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 484 (1896)

(23) 353 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956); see also-Bragg v. Weaver 251 U.S. 57, 59-61, 40 S.Ct. 62, 64 L.Ed. 135(1919)

(24) 244 U.S. 317, 37 S. Ct. 638, 61 L.Ed. 1163 (1917); see also-American Surety Co. v. Baldwin 287 U.S. 156, 168, 53 S.Ct. 98, 77L.Ed. 231 (1932)

(25) 219 U.S. 35, 42-44, 31 S.Ct. 136, 55 L.Ed. 78 (1910)

(26) 273 U.S. 510, 534, 47 S.Ct. 437, 71 L.Ed. 749, (1927); see also-In Re Murchingson 349 U.S. 133, 137, 75 S.Ct. 623, 99 L. Ed. 942 (1955)

(27) 225 U.. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912)

(28) 33 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948)

(29) 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220 (1866)

(30) 165 U.S. 150, 153-154, 17 S.Ct. 255, 41 L.Ed. 666, (1897); see also- Atchison, Topeka, & Santa Fe Ry. Co. v. Vosburg 238 U.S. 56, 59-61, 35 S.Ct. 675, 59 L. Ed. 1199 (1915)

(31) Bailey v. St. of Ala. 219 U.S. 219, 240-241, 31 S. Ct. 145, 55 L.Ed. 191 (1911)

EDITOR'S NOTE

Pagination does not follow in numerical order. There are no pages missing.

UNITED STATES SUPREME COURT

In the Matter of: :

DISCIPLINARY PROCEEDINGS :
AGAINST THOMAS G. HETZEL,
:

Attorney at Law. CASE NO.
:

APPENDIX TO JURISDICIAL STATEMENT

Case No. 82-382-D

STATE OF WISCONSIN : IN SUPREME COURT

In the Matter of Disciplinary Proceedings Against THOMAS G. HETZEL, Attorney at Law

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PER CURIAM

Attorney disciplinary proceeding; attorney's license suspended.

Thomas G. Hetzel appeals from the report of the referee concluding that his conduct in several legal matters violated the Code of Professional Responsibility and recommending that his license be suspended for a minimum of one year as discipline for professional misconduct. Hetzel objects to some of the referee's findings, contest the conclusions that his actions constituted unprofessional conduct, and argues that the recommended discipline is too severe. The Board of Attorneys Professional Responsibility cross-appeals from the report,

claiming that the referee failed to conclude that Hetzel violated a specific ethical provision in one legal matter, unnecessarily refused to make findings concerning another matter because a proceeding growing out of that matter was pending in federal court, and erred in his conclusion that Hetzel's neglect of a legal matter did not amount to unprofessional conduct. The Board also disagrees with the recommended discipline, arguing that the indefinite suspension of Hetzel's license, with permission to apply for reinstatement after one year, is appropriate to the totality of Hetzel's misconduct.

We accept the findings of the referee, reject only that conclusion concerning Hetzel's neglect of a client's legal matter, and determine that a one-year suspension of Hetzel's license is appropriate discipline in this case. Although the referee did not address the issue, we assess the costs of the disciplinary proceed-

ing against Hetzel.

We review the findings, conclusions, and recommendation of the referee, the Hon. John A. Fiorenza, reserve judge. In reviewing the facts found by the referee we apply the "clearly erroneous" standard, Disciplinary Proceedings Against Swartwout, 116 Wis.2d 380, 382-383 (1984). As to conclusions of law, however, the court is not bound to accept those made by the referee. Disciplinary Proceedings Against Norlin, 104 Wis.2d 117, 122, 310 N.W.2d 789 (1981).

Hetzel was admitted to practice law in Wisconsin in 1968 and practices in Kenosha. Although this disciplinary action against him was commenced by the Board's filing of a complaint on March 1, 1982, several subsequent amendments of the complaint resulted in the matter being determined on a fourth amended complaint filed April 29, 1983. The Board alleged nine counts of unprofessional conduct in

n that complaint, but two of those counts were dismissed with the Board's consent. We consider, seriatim, the seven remaining counts.

(1) Between 1974 and 1980, Hetzel received payments from a group of persons who had retained him to represent them in a dispute. Those funds were received both as attorney fees and as funds to be placed in a trust account on the clients' behalf. In 1980, two of the clients asked Hetzel to provide them with an accounting of their funds. Because the Board had received information concerning a possible ethical violation, staff attended the deposition but did not participate in it.

Following the depostion the Board sent Hetzel a written request to submit a full accounting of the funds of the two clients. Hetzel's response was that he had made an accounting at the deposition, a copy of the transcript of which the Board had in its possession. Hetzel told the Board that he would make a further

accounting only if he were paid for his time to do so, and he demanded the sum of $1,000.00 in advance as such payment. The referee concluded that Hetzel's refusal to render an accounting to his clients and to the Board constituted professional misconduct, in violation of SCR 20.04(1), 20.50(2)(c), and 22.07(2) and (3).

The Board contends the referee should have concluded that Hetzel's conduct violated SCR 11.05(2), which requires an attorney to maintain trust account records. However, the Board did not allege a violation of that rule in its complaint, and the referee made no findings on which to base such conclusion.

Hetzel contends that he did not violate SCR 20.50(2)(c), requiring a lawyer to maintain complete records of all client funds coming into his possession, for the reason that the rule does not specify what form those records are to take. The referee found that his

oral "accounting" made at the deposition, accompanied by a ledger sheet attached as an exhibit, was inadequate, and we accept that finding. Consequently, we accept the referee's conclusions as to Hetzel's unprofessional conduct in this matter.

(2) In a 1980 divorce action in which Hetzel represented the husband, following the court's rendition of a memorandum decision granting a divorce and ordering property division, but before entry of the court's judgment Hetzel and his client met with the opposing party and had the woman sign a stipulation granting her ex-husband one-half of the proceeds of anticipated sale of the parties' residence. In its memorandum decision the court had awarded the residenct to the wife. Prior to the meeting, Hetzel did not consult with the woman's attorney, although he knew that she had been represented by counsel throughout the divorce proceeding. Upon subsequent motion of the woman's attorney, the court held the stipulation

signed in Hetzel's office to be a nullity. The referee concluded that Hetzel's failure to consult with an opposing party's attorney before entering into a stipulation for property division, especially one which gave the opposing party less than the court had given her, violated SCR 20.04(1), 20.38(1) and 20.48.

Hetzel claims that he was only a scrivener at the signing of the stipulation. He maintains that he did nothing more than reduce to writing what the parties told him they had independently agreed upon following the court's memorandum decision. On this issue, Hetzel's testimony, as well as that of his client, directly contradicted the testimony of the woman that she had been coerced by her husband to go to Hetzel's office where she was presented with the stipulation to sign.

Hetzel also contends that he was not obliged to consult with the woman's attorney because the attorney-client relationship termi-

nated upon the court's rendering of the memorandum decision. He characterizes the stipulation as a "post-judgment matter." This contention is without merit.

We accept the referee's findings as not clearly erroneous, and we adopt his conclusion as to Hetzel's unprofessional conduct in this matter.

(3) In the course of his representation of a man charged with solicitation for prostitution, Hetzel notified the district attorney that he was going to contact the state's witness. He sent the witness a letter, stating in part,

> "Frankly, I do not believe it is in your best interest, or the best interest of your marriage, or in the best interest of your standing in the community to have this entire matter aired. In your case, this entire matter could be emotionally brutal....It is my understanding that the State of Wisconsin is not pressing this case and, if you desire it to be dismissed, the State would be happy to oblige you."

When he wrote the letter, Hetzel knew from the pretrial conference held in the matter that the

state intended to go to trial. The referee concluded that Hetzel attempted to influence the testimony of the witness, in violation of SCR 20.38(2), by seeking dismissal of the criminal charge against his client and engaged in conduct involving dishonest, fraud, deceit or misrepresentation, in violation of SCR 20.04 (4), by advising the witness that the state was not pressing the case.

Hetzel argues that he has the right and obligation to contact witnesses on behalf of his client in a criminal proceeding, that his letter in no way addressed the witness's testimony and, therefore, could not constitute an attempt to influence that testimony, and that he did not misrepresent the state's position in the matter because he "encouraged" the witness to discuss the matter with the prosecutor after she had had an opportunity to discuss it with Hetzel "on a friendly basis." These arguments are without merit, and we adopt the referee's

conclusion concerning Hetzel's ethical violations.

(4) During 1978 and 1979, Hetzel represented a man named Peters in a breach of contract action. At the same time, Hetzel represented Peter's son-in-law, Drake, in a divorce action against Peters's daughter. Peters had advanced a $200 retainer to his daughter's attorney in the divorce matter, and the divorce judgment ordered Drake to pay $200 to the daughter's attorney, which amount was to be deposited into that attorney's trust account and paid over to Peters. When Drake paid $125 to Hetzel pursuant to that judgment, Hetzel deposited it in his trust account, withdrew it and applied it to his fees for services to Peters in the breach of contract action without Peters's consent. In that contract matter, Peters disputed the fees Hetzel was demanding for his services.

We adopt the referee's conclusion that

Hetzel's action in withdrawing the funds from the trust account and applying them to his fee for legal services without his client's consent constituted misconduct in violation of SCR 20.04(1), 20.50(1)(b), and 20.50(2)(d). In so concluding, the referee rejected Hetzel's claim that Peters had verbally authorized him to apply Drake's payment to Hetzel's fee for services in the contract action.

(5) The referee refused to make findings concerning Hetzel's December 15, 1979 conviction of the battery of his wife and his conduct during that proceeding for the reason that there was a writ of habeas corpus pending in federal court concerning that conviction. The referee expressed his opinion that the pending matter might affect the outcome of the battery conviction. The Board, however, objects to the referee's position, arguing that Hetzel's conduct violated a criminat statute and involved moral turpitude, thus constitution grounds for

discipline, SCR 21.03(1).

The Board takes the position that Hetzel's conviction itself is proof of misconduct unless and until the conviction is reversed. It notes that SCR 11.03(1) provides for the summary suspension of an attorney's license upon the court's receipt of satisfactory proof of an attorney's conviction of a serious crime, regardless of the pendency of an appeal. In fact, during the course of this disciplinary proceeding the Board sought summary suspension of Hetzel's license based on this battery conviction, but we denied its petition, leaving the matter for determination in this proceeding.

The Board also contends that the referee should have made findings concerning Hetzel's conduct in the battery proceeding. At the hearing on his wife's motion to quash a subpoena served on her, Hetzel completed his wife's argument to the court after his wife became ill. The Board argues that the pending

habeas corpus petition has no bearing on that conduct.

Even if the Board's contentions are correct, we refrain from making our own findings and conclusions based upon the record in this matter. Rather than remanding the matter to the referee for such findings and conclusions, it is preferable to dismiss those charges without prejudice, thereby permitting the Board to present them in subsequent disciplinary proceeding should it choose to do so.

(6) In January, 1978 a woman named Lake retained Hetzel to represent her in a claim for personal injuries sustained in an automobile accident in Virginia. Hetzel commenced an action in federal court in Wisconsin, which was dismissed in January, 1980 for lack of personal jurisdiction. In that action, Hetzel failed to respond to the defendant's motion to dismiss, although he moved to transfer venue of the case on the same day the motion to dismiss was

granted. Despite numerous calls of the status of her case following dismissal and failed to disclose that information to the Board after it had requested information concerning the matter.

The referee concluded that Hetzel did not adequately represent Lake in the action but that such negligent representation, while it might have constituted malpractice, did not consitute professional misconduct under our ethical rules. That conclusion was bases on the referee's finding that the client knew she could have made an appointment to meet with Hetzel, but she did not telephone his office specifically to make such an appointment.

We are persuaded by the Board's argument that Hetzel's failure to inform his client of the status of her case constituted misconduct, as well as negligence. Lake had a right to be informed of the status of her case, and Hetzel

knew that she was interested in that information, for she testified that she telephoned him some ten times between 1981 and 1983 requesting information on the status of her claim. Hetzel never made a status report to her, nor did he advise her of the dismissal of her action or of his failure to recommence an action before the statute of limitations on her claim expired. In fact, Lake did not learn that the action had been dismissed until the hearing held in this disciplinary matter, March 10, 1983, although the case was dismissed in January, 1980, and the statute of limitations expired in August of that year.

We conclude that Hetzel's conduct in this matter constituted neglect of a client's legal matter, in violation of SCR 20132(3).

(7) In 1980 Hetzel represented a woman on a criminal charge. A friend of his client posted $1,000 bail on her behalf and assigned

his cash bond to Hetzel for application to the client's legal fees. Hetzel subsequently entered into a plea agreement with the prosecutor providing that the prosecutor would recommend a six-month jail term in exchange for a no contest peal on the criminal charge and an agreement to pay $1,000 in restitution.

At the sentencing hearing, an assistant district attorney who had not personally been party to the plea agreement recommended a six-month jail term for Hetzel's client with payment of restitution in the amount of $1,000 but specified that the restitution was to be made with the $1,000 bail. Hetzel told the court that $1,000 bail had been assigned to him for payment of his fees for representing the client, and he refused to agree to its being applied as restitution. The court sentenced Hetzel's client to five years in prison on the criminal charge.

The Board alleged that Hetzel allowed his personal interests and financial gain to affect his representation of his client and that he acted adversely to his client's interests to further his own personal financial gain. The referee concluded that Hetzel's representation of his client was affected by his own personal and financial interests, in violation of SCR 20.24(1), and represented a failure to seek the lawful objectives of his client through reasonably available means, in violation of SCR 20.35 (1)(a).

The issue whether Hetzel acted in the presence of an actual conflict of interest at the sentencing hearing was before the Court of Appeals, which held that there was such an actual conflict of interest, regardless of the content of the plea agreement. State v. Franklin, 111 Wis.2d 681, 331 N.W.2d 633, (1983). The court said:

> "...By causing the hearing to degenerate into an argument over the use of the bond money, Hetzel sacrificed Franklin's interest in showing the court that a statisfactory plea agreement had been entered into that would make the victim whole. Franklin also had an interest in the state's enthusiastice support for the six month term; Hetzel's actions compromised any opportunity for this type of wholehearted endorsement. Finally, in actively and continually asserting that the bond money would be used to pay his fees, Hetzel implicitly stated to the court that his client was untrustworthy; he was unwilling to work out another arrangement with her for payment, yet he was asking the state to to do so." Id., at 688.

The referee's conclusion as to Hetzel's unprofessional conduct in this matter was premised on this Court of Appeals opinion, and we adopt that conclucion. We are unconvinced by Hetzel's claim that his client had no interest in the bond money for the reason that it was not hers but had been deposited by her friend on her behalf.

On the issue of appropriate discipline, Hetzel argues that the recommended minimum

discipline of a one-year suspension of his license is extreme because none of his misconduct involved moral turpitude or intentional wrongdoing. Even if this contention were correct, which it is not, a one-year suspension of his license would not, for the reason, be inappropriate to the nature and extent of his misconduct.

The Board, for its part, takes the position that Hetzel's misconduct warrants more severe discipline that a one-year suspension. It argues for the imposition of an indefinite suspension, with the opportunity for Hetzel to apply for reinstatement of his license after one year. The Board bases it position on its perception of some confusion as to its ability to report to the court on a subsequent petition for reinstatement in terms of the gravity of the offenses originally considered by the court in establishing the term of suspension. It suggests that prior cases imply that a peti

tioner for reinstatement may enjoy a presumption of rehabilitation upon the expiration of a specified term of suspension where no evidence of intervening misconduct is present. To illustrate this "confusion," the Board cites Petition of Eisenberg, 96 Wis.2d 342, 291 N.W. 2d 342 (1980), in which the court rejected the Board's recommendation to deny Eisenberg's petition for reinstatement, and Disciplinary Proceedings Against Hersh, 108 Wis.2d 450, 321 N.W.2d 927 (1982), in which the court examined the gravity of the underlying misconduct and denied reinstatement.

Those two cases are not inconsistent. A petitioner for reinstatement has the burden of demonstrating by clear and convincing evidence possession of the requisite moral character to practice law in Wisconsin and the resumption of practice will not be detrimental to the integrity and standing of the bar or the administration of justice or subversive of the public

interest. SCR 22.28(6). In addition, a petition for reinstatement must show that the petitioner has a proper understanding of and attitude toward the standards imposed upon members of the bar and that he or she will act in conformity with those standards. SCR 22.28 (4)(g). The Board is explicitly authorized to investigate the eligibility of the petitioner for reinstatement, SCR 22.28(5), and such investigation will necessarily encompass the petitioner's attitude and understanding of the ethical rules of practice. The extent of that investigation may vary according to the nature of the petitioner's misconduct, but the Board may not recommend against reinstatement solely for the reason that it perceives the petitioner's misconduct as of sufficient gravity to warrant a period of suspension longer that that imposed by the court.

Having accepted the referee's findings of fact and having adopted his conclusions as to

Hetzel's misconduct, with the exception of that concerning the Lake matter, as to which we concluded that Hetzel's neglect of his client's matter constituted unprofessional conduct, we determine that the referee's recommended minimum discipline is appropriate.

It is ordered that the license of Thomas G. Hetzel to practice law in Wisconsin is suspended for one year, commencing June 1, 1984.

It is further ordered that Thomas G. Hetzel pay to the Board of Attorneys Professional Responsibility withone one year of the date of this order the costs of this disciplinary proceeding in the amount of $18,532.80, provided that if the costs are not paid within the time specified, the license of Thomas G. Hetzel to practice law in Wisconsin shall be revoked forthwith.

Office of the Clerk
SUPREME COURT
State of Wisconsin

Madison, May 24, 1984

Honorable John A. Fiorenza
5960 W. Brown Deer Road
Milwaukee, WI 53223

David L. Walther
222 E. Mason St.
Milw, WI 53202

Thomas G. Hetzel
2604 Washington Road
Kenosha, WI. 53140

Thomas D. Kuehl
831 W. Wisconsin Av.
Milw, WI 53233

Board of Attorneys Professional Responsibility

The Court today announced an order in your case as follows:

In the Matter of Disciplinary Proceedings Against Thomas G. Hetzel, Attorney at Law

Case No. 82-382-D

On May 14, 1984 Thomas G. Hetzel filed a motion for reconsideration of the court's opinion issued April 24, 1984 ordering the suspension of his license to practice law in Wisconsin for one year, commencing June 1, 1984, and ordering him to pay the costs of

the disciplinary proceeding within one year of the date of the order. The motion for reconsideration also requested the court to stay its order of suspension pending "the exhaustion of Hetzel's appeal rights herein."

IT IS ORDERED that the request for a stay of the order suspending Thomas G. Hetzel's license to practice law in Wisconsin is denied and the motion for reconsideration is denied.

IT IS FURTHER ORDERED that if more time is needed for the respondent to comply with the court's order for the payment of costs in the disciplinary proceeding, the respondent may file a motion to that effect at such time as he petitions for reinstatement of his license to practice law.

MARILYN L. GRAVES,
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against:

THOMAS G. HETZEL, Case No. 82-382-D

Attorney at Law.

FINDINGS OF FACT AND RECOMMENDATIONS BY REFEREE

The above-captioned matter came on for hearing on March 8, 10, and July 1, 1983. Briefs have been filed by both parties with the last supplement to the brief having been received by this referee on August 19, 1983.

The Board of Attorneys Professional Responsibility was represented by Attorney David L. Walther, and Thomas G. Hetzel was represented by Alan D. Eisenberg, S.C. by Attorney Thomas D. Kuehl.

FINDING OF FACTS

COUNT 1

Edward and Vera Peters

1. That the Respondent represent Edward and Vera Peters.

2. That during the course of the Respondent's representation of Mr. and Mrs. Peters, certain funds were paid to him, to be held in trust.

3. That Mr. and Mrs. Peters requested an accounting of those funds, as indicated by Exhibit 1 and Exhibit 2 of the deposition taken of the Respondent on September 17, 1980, which deposition and the exhibits attached thereto were marked an Exhibit No. 22 in this proceeding.

4. That the Respondent received a letter request from the Board of Attorneys Professional Responsibility, dated October 24, 1980, to furnish a complete accounting of all funds

received on behalf of Edward and Vera Peters.

5. That the Respondent failed to provide the accounting unless he was paid by the Board for his time in preparation of the accounting.

6. That the Respondent's actions constituted professional misconduct in violation of SCR 20.50(2)(c), SCR 22.07(2) and (3), and SCR 20.04(1).

COUNT 2

Ellen Dibble

1. That the Respondent represented Bruce Dibble in a divorce action, Kenosha County Circuit Court Case No. 29343.

2. That Judge Zievers had rendered a memorandum decision on October 21, 1980, which decision, among other things granted the residence of the parties to Ellen Dibble.

3. That Ellen Dibble was represented by Attorney Bruce E. Schroeder.

4. That on November 12, 1980, the Respondent met with Bruce Dibble and Ellen Dibble, in

the Respondent's office, and at that time the Respondent prepared and had signed a Stipulation which granted half of the proceeds of the sale of the residence of the parties to Bruce Dibble.

5. That the Respondent did not consult with Ellen Dibble's counsel prior to preparing the Stipulation or prior to his meeting with Ellen Dibble.

6. That the Stipulation prepared by the Respondent on November 12, 1980, gave Ellen Dibble less than what had been awarded to her in the memorandum decision by Judge Zievers.

7. That Judge Zievers found the Stipulation of November 12, 1980, to be a nullity.

8. That the Respondent's communication with Ellen Dibble on the subjct matter of the divorce, when he knew that Ellen Dibble was represented by a lawyer constitutes misconduct in violation of SCR 20.38(1), SCR 20.04(1), and SCR 20.48.

COUNT 3

Joe L. Johnson

1. The Respondent represented Joe L. Johnson, Jr. in a criminal matter.

2. That the Respondent sent a letter to the State's principal witness, Candance E. Ockert, (Board Exhibit No. 10), which letter attempted to influence the witness in seeking the dismissal of the ciminal charge against Mr. Johnson.

3. That the Respondent attempted to improperly influence the testimony of Mrs. Ockert by informing her that she would be embarraseed at the time of trial and that it would not be in "your best interest, or the best interests of your marriage, or in the best interest in your standing in the community to have this entire matter aired."

4. The Respondent is guilty of misconduct in violation of SCR 20.38(2), SCR 20.04(1), and SCR 20.04(4).

COUNT 4

ELSWORTH PETERS

1. That the Respondent was the attorney for Elsworth Peters.

2. That the Respondent was also the attorney for Elsworth Peters' son-in-law, Mr. Drake.

3. That in the Drake divorce, the Court ordered Mr. Drake to repay Elsworth Peters $200.00 which he had furnished to his daughter, Mrs. Drake, as a retainer in the divorce action.

4. That the Court Order required Mr. Drake to pay $200.00 into the Respondent's trust account, and said funds were to be forwarded to the attorney for Mrs. Drake, for ultimate payment to Mr. Elsworth Peters.

5. That Mr. Drake paid funds to the Respondent and the Respondent failed to forward the funds to Mrs. Drake's attorney, but rather applied the funds as attorney fees in the case wherein the Respondent represented Elsworth

Peters.

6. That Mr. Peters did not agree to the Respondent's applying the funds received from Mr. Drake to Elsworth Peters' account.

7. That there was a dispute as to the fees that Mr. Peters was to pay the Respondent.

8. That the Respondent's action in withdrawing funds from the trust account and applying it to his legal service, without Elsworth Peters' agreement, constituted misconduct in violation of SCR 20.50(1), SCR 20.50(2)(d), and SCR 20.04(1).

COUNT 5

Gail Hetzel

This count concerns the Respondent's conviction of the crime of battery. Mrs. Hetzel was the victim in this particular case. Mr. Hetzel had attempted to represent his wife in a hearing to quash the subpoenae that had been

issued for Mrs. Hetzel. The Referee has been informed by the attorney for the Respondent that there is a pending writ of habeas corpus action brought in Federal Court Case No. 83-C 0475. That particular action in Federal Court concerns the battery conviction. In view of the fact that the matter is still pending and may affect the outcome of the battery action, I will make no findings on this count.

COUNT 6

Betty Lake

1. The Respondent was retained by Betty (Hastings) Lake on January 23, 1978, to handle a personal injury action.

2. That Mrs. Lake attempted to get information concerning her action from the Respondent at various times, through the Respondent's secretary.

3. That Mrs. Lake knew that she could set an appointment with Respondent, but failed to call his office for an appointment.

4. That the Respondent did not adequately represent Mrs. Lake in the Federal Court action before Judge Gordon, however, such negligent representation of Mrs. Lake, while it may constitute malpractice, does not constitute misconduct under the Supreme Court Rules.

5. That there is no misconduct in the matter concerning Betty Lake.

COUNT 7

Karen Franklin

1. That Respondent represented on Karen Franklin in a criminal matter concerning felony theft.

2. That in the plea bargain hearing before the trial court, the Respondent allowed his personal interests and financial gain to effect his representation of his client.

3. That the Respondent acted adverse to the interest of his client to further his own personal financial interest.

4. That the Respondent's actions constitute a violation of SCR 20.23(1), SCR20.24 (1), SCR 20.35(1)(a) and SCR 20.31(4).

The Borad of Attorneys Professional Responsibility has withdrawn its chage concerning the aggravated battery case against Mrs. Hetzel (paragraph 12 of the Fourth Amended Compalint) and the Board chose not to offer any proof with respect to the bail jumping charge (paragraph 13 of the Fourth Amended Complaint). Those two charges are dismissed.

RECOMMENDATION

The Respondent has carried on a course of professional misconduct in a number of cases. One of these violations would be sufficient to recommen suspension for a period of time. The cumulative nature of the professional misconduct of the Respondent requires appropriate action.

I recommend that the Respondent's license to

practice law be suspended for a minimum of one year. In the event that the Respondent seeks reinstatement of his license after the period of suspension, the Court should require as a condition of the reinstatement that the Board of Attorneys Responsibility certify that they believe the Respondent can practice law in compliance with the Code of Professional Responsibility if he is so reinstaed.

Dated at Milwaukee, Wisconsin, this 13th of September, 1983.

Respectfully submitted,

_____

John A. Firenza, Referee

SUPREME COURT OF WISCONSIN

In the Matter of Disciplinary Proceedings Against:

THOMAS G. HETZEL,

Attorney at Law

MOTION FOR RECONSIDERATION AND MOTION FOR STAY OF SUSPENSION OF LICENSE

CASE NO. 82-382-D

THOMAS G. HETZEL, in appeal No. 82-382-D, moves the Court, pursuant to Rule 809.64 under Rule 809.14 to reconsider the opinion of the Supreme Court made and filed in this matter on the 24th day of April, 1984, and further moves this Court to stay the order of suspension herein pending the exhaustion of Hetzel's appeal rights herein. That the grounds of this motion are as follows:

A. As to the request for stay, Hetzel states that he is aggrieved by the Court's decision herein and does seek to review the same by further legal proceeding based hereon.

that to enforce said opinion or judgment of this Court would be inequitable until said judgment or opinion of the Court is conclusively adjudicated.

B. As to the request for reconsideration, Hetzel respectfully submits to the Court as follows:

1. That this Court has denied Hetzel procedural and substantive due process by changing the trier of fact and standard of proof herin in an ex post facto or retrospective application without permitting Hetzel adequate prior notice thereof. That the rule of law enuniciated in Disciplinary Proceedings Against Swartwout, 116 Wis.2d 380, 382-83, a decision rendered on January 27, 1984, was not the rule of law at the time of the March and July 1983 hearings, nor was it the rule of law at the time of the submission of briefs or argument to the referee herein. That this change of procedure in mid-stream

prejudices Hetzel in the presentation of evidence, and argument before both the referee and the Supreme Court.

That if Hetzel had been aware of the standard of review enunciated by this Court, he would have moved the referee for further supplementary findings and would have asked him to reconsider certain portions thereof.

2. That Hetzel was denied the right to due process of law, both procedural and substantive, as to the assessing of costs herein. That the first time that Hetzel was advised of any sums relating thereto was at the time of the Supreme Court's opinion. That he does not know, nor has he been advised of the basis of the $18, 532.80. He does not know what hourly rate was applied by this Court as to the Board's attorneys or the referee or the other costs relating thereto. He does not know what portion of the costs related to the charges of the Board relating to his wife, which were ultimately

dismissed. That in view of the substantial sum set herein for costs for which Hetzel was not given notice or opportunity to be heard thereon, the setting of a one year period of repayment when Hetzel has been deprived of his principal source of livelihood is arbitrary and capricious and especially harsh since noncompliance could result in the revocation of his license.

3. That Hetzel was denied the right to a jury trial on the issues herein.

4. Edward and Vera Peters - That this Court has not found in what ways the accounting rendered by Hetzel was inadequate, not did the Court find that the multiple and numerous questions propounded by the Board were reasonable.

5. That this Court cannot find that the accounting made by Hetzel is inadequate unless it can state as a matter of law what form the accounting should take.

6. Ellen Dibble - That there is no

indication that Hetzel coerced Ellen Dibble. In fact, the record does show that he gave her ample opportunity to consult with a lawyer of her choice. He did in fact make changes to the agreement upon her urging.

7. That there is no finding by the referee that Ellen Dibble did not execute the document voluntarily. There was no finding by the referee that Ellen Dibble could not discharge her attorney and proceed in her own behalf if she so choose as she in fact did.

8. Joe Johnson - That the Court upheld the referee's determination that Hetzel had improperly attempted to influence a witness's testimony although this is entirely unsupported by the record and Hetzel was in fact only charged with an attempt to give legal advice.

9. Ellsworth Peters - The referee's findings are clearly erroneous since there never was an order that Drake's contribution be paid to Hetzel's Trust Account. That this

Court failed to follow sequentially the events herein and particularly failed to determine when the dispute arose as to the fees. Although this Court wishes to find that the referee implicitly disregarded the verbal authoriztion, an express finding should be required. Under the circumstances herein, a verbal authorizations is entirely usual and customary and the Court's decision unnecessarily burdens the practitioner with an extraordinary high degree of care which would in effect require written authorizations for disbursements from trust account funds.

10. That at all material times herein, there was no dispute as to fees. That the only dispute as to fees arose substantially after the transfer of funds with notice thereof to Peters.

11. Betty Lake - Although Lake indicated that she had telephoned Hetzel's office, there

is no indication that she talked to anyone but Hetzel's personnel. She could have scheduled an appointment, but chose not to. Accordingly, this Court cannot determine that Hetzel knowingly failed to advise Lake about the status of her case. Furthermore, the Court's contention that Hetzel could have recommenced the action until August of 1980 is erroneous because the statute of limitations in the forum state would have been a two-year and not a three-year statute.

12. Karen Franklin - The referee erroneously found that Hetzel was guilty of misconduct for asserting to the lower court that restitution was to be accomplished by a means other than application of the bail bond. The money in fact was not the defendant's and Hetzel had fully earned the same. Hetzel had a duty to assert that restitution was not to be accomplished through the bail bond and the

Court should not ask him to personally finance restitution with his own funds. This would, in effect, constitute the taking of property without just compensation and be constitutionally violatve.

13. Discipline - The year suspension is unduly severe considering the nature of the offenses herein. Neither the Court, nor the referee discusses what factors were taken into acoount, nor why other less severe forms of discipline would not accomplish the same result. For this Court and the referee to select a period of time or form of discipline without indicating upon the record the reasons underlying it constitutes a violation of substantive and procedural due process and is arbitrary and capricious. The year suspension is particularly severe in light of the lack of real moral turpitude herein.

For the foregoing reasons, Hetzel prays

that this Court reconsider its opinion herein and stay the one year period of suspension herein.

Dated this 11th day of May, 1984.

STATE OF WISCONSIN

In the Matter of the Disciplinary Proceedings Against:

THOMAS G. HETZEL,

Attorney at Law.

NOTICE OF APPEAL

Case No. 82-382-D

TO: MS. MARILY L. GRAVES
Clerk-Wisconsin
Supreme Court
State Capitol
P.O. Box 1688
Madison, WI 53701-1688

ATTORNEY DAVID L. Walther
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BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY
610 North Jackson Street - Room 204
Milw., WI 53202

HON. JOHN A. FIORENZA
RESERVE JUDGE
5960 West Brown Deer Road
Milw., WI 53223

NOTICE IS HEREBY given that the above names respondent, THOMAS G. HETZEL, hereby appeals to the Supreme Court of the State of Wisconsin from the entire report containing the referee's findings of fact and recommendations filed in the Supreme Court on

September 13, 1983, the HON. JOHN A. FIORENZA presiding as referee, Case No. 82-382-D, all pursuant to SCR 21.09(5)(1982). The referee in said report made certain findings relating to the violations of certain Supreme Court Rules and recommended a one year period of suspension.

Dated this Twenty-ninth day of September, 1983.

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